

Court Dismisses Case for Failure to Plausibly Allege That Text Messages Constituted Telemarketing

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The Southern District of New York recently granted a motion to dismiss in a putative TCPA class action because plaintiff failed to plausibly allege that the texts at issue constituted telemarketing or contained advertising material, thus requiring plaintiff's prior express *written* consent. The decision highlights the importance of pleading the specific content of the communication at issue in a TCPA case, which directly impacts the type of consent that is required.

In [Rotberg v. Jos. A. Bank Clothiers, Inc.](#), plaintiff alleged that defendants Jos. A. Bank Clothiers and its alleged vendor, Vibes Media, violated the TCPA when they sent two text messages to his cell phone. No. 16-cv-2962, 2018 WL 5787480, at *1 (S.D.N.Y. Nov. 5, 2018). Plaintiff conceded that he provided his cell phone number to defendants prior to receiving the texts, but did not describe when or how, and insisted he did not consent to receive what he alleged were marketing text messages. *Id.* at *1-2.

Initially, the court rejected defendants' argument that plaintiff lacked Article III standing, finding that plaintiff had sufficiently alleged injury from the receipt of unwanted text messages. *Id.* at *4. The court also rejected the argument that plaintiff failed to plausibly allege that defendants used an ATDS to send the text messages. *Id.* at *6-7.

The court then turned to the defendants' argument that the claims should be dismissed because plaintiff consented to receive the messages at issue. *Id.* at *7. Critical to the court's analysis was the fact that plaintiff did not plead the specific content of either text message in his complaint. *Id.* at *11.

Initially, the court summarized the FCC's "two-tier system of consent" for text messages and calls and the distinctions between "prior express consent" and "prior express *written* consent." *Id.* at *7. Indeed, "[t]he level of consent required for any given call turns on that call's content" and "[a]ll calls other than those containing advertisements or constituting telemarketing require only "the prior express consent of the called party." *Id.* (citing 47 C.F.R. § 64.1200(a)(1)). The court held that plaintiff's concession that he gave his cell phone number to defendants was sufficient to establish "prior express consent" to receive non-telemarketing autodialed calls. *Id.* Accordingly, the court analyzed whether the two text messages contained telemarketing content. *Id.*

Although Plaintiff described the first text as an “initial marketing text message,” he did not plead the content of the message other than saying that it referred recipients to a webpage that included terms and conditions for participation in defendants’ mobile marketing program. *Id.* at *7-9. The court declined to construe this message as telemarketing because “a caller seeking out a consumer’s express written consent to send *subsequent* telemarketing or advertising texts is not as a matter of law already engaged in telemarketing.” *Id.* at *9. Indeed, “a text sent solely for the purpose of allowing the recipient to complete a registration process” is not telemarketing. *Id.*

The second text message was an “opt-out confirmation text.” *Id.* at *10. Plaintiff again did not plead the actual content of the message. *Id.* Instead, he alleged that it contained marketing material in the form of a link to the Vibes website. *Id.*

The court recognized that, under the FCC’s *SoundBite* ruling, one-time opt-out confirmation texts generally fall within the scope of the recipient’s prior express consent to receive text messages provided they do not contain marketing material. *Id.*

Applying *Soundbite*, the court found that the text was a permissible opt-out confirmation. *Id.* The link to Vibes’s website did “nothing more than provide consumers with a means of contacting Vibes for help, and thus is akin to providing ‘instructions as to how a consumer can opt back in,’ which ‘fall[s] reasonably within consumer consent’” under *SoundBite*. *Id.*

Although the court dismissed plaintiff’s claims regarding both text messages, it granted him leave to replead, provided he could do so in good faith. *Id.* at *11. Indeed, the court acknowledged that plaintiff might be able to plausibly allege that the texts contained marketing material depending on their specific content. *Id.*

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